



INTERNATIONAL TRADE COMMISSION

Certain Foam Footwear

[Investigation No. 337-TA-567 (Advisory Opinion Proceeding 2)]

Notice of the Issuance of an Advisory Opinion; Termination of the Advisory Opinion Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to issue an advisory opinion in the above-captioned investigation. The Commission also terminates the advisory opinion proceeding.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the underlying investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. ("Crocs") of Niwot, Colorado. 71 FR 27514-15 (May 11, 2006). The complaint alleged, *inter alia*, violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858 ("the '858 patent") and U.S. Patent No. D517,789 ("the '789 patent"). The notice of investigation named several respondents, including Double Diamond Distribution

Ltd. (“Double Diamond”) of Saskatoon, Canada.

On July 25, 2008, the Commission issued a final determination finding no violation of section 337. 73 FR 45073-74 (Aug. 1, 2008). On July 15, 2011, after an appeal to the U.S. Court of Appeals for the Federal Circuit and subsequent remand vacating the Commission’s previous finding of no violation, the Commission found a violation of section 337 based on infringement of the asserted claims of the patents and issued a general exclusion order (“GEO”) and, *inter alia*, a cease and desist order (“CDO”) directed against Double Diamond. 76 FR 43723-24 (July 21, 2011).

On March 28, 2020, the ’789 patent expired. Accordingly, the GEO and CDO, by their terms, are only directed to articles that infringe one or more of claims 1 and 2 of the ’858 patent. On December 8, 2020, Double Diamond submitted a request for institution of an expedited advisory opinion proceeding to determine whether its new Original Beach DAWGS™ shoes with plastic washers are subject to the GEO or CDO. On December 18, 2020, Crocs opposed Double Diamond’s request for an expedited advisory opinion proceeding. On December 22, 2020, Double Diamond moved for leave to file a reply to Crocs’ opposition, and on December 23, 2020, Crocs responded to Double Diamond’s motion for leave to reply.

On January 7, 2021, the Commission instituted an advisory opinion proceeding to determine whether Double Diamond’s new Original Beach DAWGS™ shoes with plastic washers fell within the scope of the GEO or CDO. 86 FR 2696 (January 13, 2021). Concurrent with the notice, the Commission ordered supplemental information and a product sample from Double Diamond. Comm’n Order (Jan. 7, 2021). On January 14, 2021, Double Diamond submitted its response to the Commission Order. On January 28, 2021, Crocs submitted its reply to Double Diamond’s submission.

Having considered the record evidence including the parties’ filings, the Commission has determined that Double Diamond’s new Original Beach DAWGS™ shoes with permanent plastic washers that prevent all direct contact between the strap and the base of the shoe do not

fall within the scope of the GEO or CDO and therefore should not be excluded. The reasons for the Commission's determination are set forth in the accompanying Advisory Opinion, and the advisory opinion proceeding is hereby terminated.

The Commission vote for this determination took place on April 13, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: April 13, 2021

Lisa Barton
Secretary to the Commission

[FR Doc. 2021-07966 Filed: 4/16/2021 8:45 am; Publication Date: 4/19/2021]